MOTION FILED
APR 2 4 2000

(5)

No. 99-1403

In The
Supreme Court of the United States

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

RAYMOND STONE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

THOMAS H. LAWRENCE
Counsel of Record
LEWIS FISHER HENDERSON
& CLAXTON, LLP
5050 Poplar Ave., Ste. 1717
Memphis, Tennessee 38157
(901) 767-6160

24pp

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

This brief is filed with the consent of Petitioners, and a letter reflecting this consent has been filed with the Clerk of the Court. Respondent withheld consent. As a result, HIAA moves pursuant to Rule 37(2)(b) of the Supreme Court Rules for leave to file this brief.

The Health Insurance Association of America files this Motion For Leave To File An *Amicus Curiae* Brief pursuant to Supreme Court Rule 37(2)(b). Respondent, Raymond Stone, has withheld his consent to the filing of this brief.

There is currently a split among the circuits as to whether an employee benefit plan fiduciary may seek to recoup benefits paid in third-party liability situations under ERISA Section 502(a)(3) when the remedy involves a monetary recovery. This split threatens a critical aspect of cost containment for HIAA's members.

For this reason, HIAA respectfully requests that its Motion For Leave To File *Amicus Curiae* Brief be granted.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Court should grant the petition to resolve a split among the federal courts of appeals 4

A. The federal courts of appeals are split over whether enforcing a recoupment provision in a health plan constitutes "appropriate equitable relief" under ERISA Section 502(a)(3) .. 4

B. The *Cement Masons* decision misconstrues this Court's decision in *Mertens* 8

II. This Court should grant the petition to resolve the circuit split concerning an important question of federal law 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Administrative Committee v. Gauf,
188 F.3d 767 (7th Cir. 1999) 4-6

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 12

Blue Cross & Blue Shield of Alabama v. Sanders,
138 F.3d 1347 (11th Cir. 1998) 4, 6

Bowen v. Massachusetts,
487 U.S. 879 (1988) 132

Central States, Southeast and Southwest Areas Health and Welfare Fund v. Neurobehavioral Associates, P.A.,
53 F.3d 172 (7th Cir. 1995) 6

Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry,
494 U.S. 558 (1990) 11

Descant v. The Administrators of the Tulane Educ. Fund,
706 So. 2d 618 (La. Ct. App. 1998) 1

Fischer Imaging Corp. v. General Electric Co.,
187 F.3d 1165 (10th Cir. 1999) 9

FMC Medical Plan v. Owens,
122 F.3d 1258 (9th Cir. 1997) 4-8, 10, 11, 13, 14

TABLE OF AUTHORITIES – Continued

Page

Golden v. Kelsey-Hayes Co.,
73 F.3d 648 (6th Cir. 1996) 9

Harris Trust & Savings Bank v. Provident Life & Accident Ins. Co.,
57 F.3d 608 (7th Cir. 1995) 6, 9

Health Cost Controls v. Isbell,
139 F.3d 1070 (6th Cir. 1997) 7

Health Cost Controls v. Skinner,
44 F.3d 1255 (7th Cir. 1995) 11

In re Unisys Corp. Retiree Medical Benefit ERISA Litigation,
57 F.3d 1255 (3d Cir. 1995) 7, 9, 11

Jefferson Pilot Life Ins. Co. v. Krafka,
50 Cal. App. 4th 190 (1996) 15, 16

LeBlanc v. Cahill,
153 F.3d 134 (4th Cir. 1998) 7, 10

Maryland Dept. of Human Resources v. Department of Health and Human Services,
763 F.2d 1411 (D.C. Cir. 1985) 12

Mertens v. Hewitt Associates,
508 U.S. 248 (1993) 2, 3, 6, 8, 9, 11, 12, 13, 16

Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.,
610 F.2d 1185 (3d Cir. 1979) 9

TABLE OF AUTHORITIES – Continued

Page

Roush v. KFC Nat'l Management Co.,
10 F.3d 392 (6th Cir. 1993) 12

Schwartz v. Gregory,
45 F.3d 1017 (6th Cir. 1995) 11

Southern Council of Industrial Workers v. Ford,
83 F.3d 966 (8th Cir. 1996) 4, 7

Strom v. Goldman, Sachs & Co.,
202 F.3d 138 (2d Cir. 1999) 7-8

The North Carolina Baptist Hospital, Inc. v. Sturgill,
129 F.3d 1260 (unpublished decision),
No. 96-1270, 1997 WL 722776
(4th Cir. Nov. 21, 1997) 2

United McGill Corp. v. Stinnett,
154 F.3d 168 (4th Cir. 1998) 7

Walker v. Rose,
22 F. Supp. 2d 343 (D.N.J. 1998) 8

Walker v. Wal-Mart Stores, Inc.,
159 F.3d 938 (5th Cir. 1998) 7

STATUTES

ERISA Sec. 502(a)(3),
29 U.S.C. § 1132(a)(3) ..... i, 2-10, 11, 13, 14-16

TABLE OF AUTHORITIES – Continued

Page

RULES

Supreme Court Rule 37.6 1

Supreme Court Rule 37(2)(b) i

OTHER AUTHORITIES

Black's Law Dictionary 663 (6th ed. 1991) 9

Fred L. Lawrence, *A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE*, §§ 255, 256 (1929) 9

John Norton Pomeroy, *A TREATISE ON EQUITY JURISPRUDENCE*, § 1401 (5th ed. 1941) 9

INTEREST OF *AMICUS CURIAE*

The Health Insurance Association of America ("HIAA") presents this brief in support of Cement Masons Health and Welfare Trust Fund's Petition for a Writ of Certiorari.[1]

HIAA is the nation's most prominent trade organization representing the private health care system. HIAA represents the interests of 290 members, which provide health benefits to more than 123 million Americans.

HIAA is filing a brief in this case because the split among the circuits as to whether an employee benefit plan fiduciary can seek to recoup benefit payments in third-party liability situations threatens an important aspect of cost containment for HIAA's members. Third-party recoupment situations arise where employee benefit plan participants are injured, receive benefits, and make another recovery, for the same injuries, from responsible third parties. In these situations, most employee benefit plans, including the Petitioner's plan here, require that the participant reimburse the plan to the extent of benefits paid.

The Ninth Circuit's decision prevents HIAA's members from enforcing these provisions within the Ninth Circuit.

---

[1] Counsel for HIAA, Thomas H. Lawrence, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Resolving the split among the circuits and providing guidance to HIAA's membership and other employee benefit plans will provide the plans with direction on how to properly contain cost through the use of subrogation and reimbursement provisions. Failing to resolve the split may result in employee benefit plans–at least in the Ninth Circuit –excluding coverage for injuries caused by third parties.[2]

SUMMARY OF THE ARGUMENT

There is a clear split among the federal courts of appeals on the precise issue presented by this petition – whether enforcing a recoupment provision in an employee benefit plan constitutes "appropriate equitable relief" available under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Seventh, Eighth and Eleventh Circuits hold that claims for relief under reimbursement or subrogation provisions of an employee benefit plan do constitute equitable claims for the purposes of ERISA Section 502(a)(3), regardless of whether a monetary recovery is involved. The Ninth Circuit disagrees, holding that a cause of action under Section 503(a)(3) will not lie whenever the substance of the remedy involves a monetary award.

The holding of the Ninth Circuit is in direct conflict with this Court's holding in *Mertens v. Hewitt Associates*[3]

---

[2] While the reported decisions do not reveal that this approach has been widely used, it has been held enforceable. *See The North Carolina Baptist Hospital, Inc. v. Sturgill,* 129 F.3d 1260 (unpublished decision), No. 96-1270, 1997 WL 722776 (4th Cir. Nov. 21, 1997).

[3] 508 U.S. 248 (1993).

and denies employee benefit plans the statutory remedies provided in Section 502(a)(3).

ERISA Section 502(a)(3) provides "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violation or (ii) to enforce any provision of this subchapter." (emphasis added)

In *Mertens*, this Court held that the phrase "other appropriate equitable relief" means those types of relief that were "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[4] The *Mertens* Court did not exclude equitable remedies which would ultimately result in a monetary recovery.

Moreover, the issue presented by this petition threatens a critical aspect of cost containment for many, if not all, employee benefit plans. The Ninth Circuit's decision effectively denies employee benefit plans the right to recoup monies paid on behalf of plan participants in situations where the plan participant recovers money, for the same injuries, from responsible third parties. The Ninth Circuit's decision may result in employee benefit plans–at least plans covering participants residing in the nine states within the Ninth Circuit–excluding coverage for injuries caused by third persons.

---

[4] *Id.* at 256.

ARGUMENT

I. The Court should grant the petition to resolve a split among the federal courts of appeals.

A. The federal courts of appeals are split over whether enforcing a recoupment provision in a health plan constitutes "appropriate equitable relief" under ERISA Section 502(a)(3).

In reaching its decision in this case, the Ninth Circuit relied entirely upon its earlier decision in *FMC Medical Plan v. Owens*,[5] which ruled that federal courts do not have subject matter jurisdiction over 29 U.S.C. § 1132(a)(3) claims whenever the substance of the remedy is monetary. The decisions in *Cement Masons* and *Owens* directly conflict with reported cases from the Seventh, Eighth and Eleventh Circuits, which specifically reject the reasoning of *Owens*.[6]

In *Administrative Committee v. Gauf*,[7] the Wal-Mart Associates Health & Welfare Plan (the "Plan") filed suit against Wal-Mart employee Patricia Gauf seeking to compel reimbursement of benefits pursuant to a plan provision requiring reimbursement when employees obtain a third-

---

[5] 122 F.3d 1258 (9th Cir. 1997).

[6] *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999); *Blue Cross and Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998); *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996).

[7] 188 F.3d 767 (7th Cir. 1999).

party tort recovery for damages arising out of the medical condition for which the Plan previously paid benefits. As in the present case, the Plan sued under ERISA Section 502(a)(3) to obtain "other appropriate equitable relief . . . to enforce . . . the terms of the Plan."

Gauf argued that the Plan was, in effect, seeking a legal remedy because the ultimate purpose of the suit was to obtain reimbursement of money, and thus, its action could not lie under Section 503(a)(3). The Seventh Circuit rejected this argument, stating:

> Although the pertinent parts of the complaint employ a variety of terms to express the relief requested, we believe that a fair reading of the document in its totality makes clear that the Committee is seeking an equitable remedy against Ms. Gauf to insure her compliance with the terms of the Plan. For example, the complaint requests "specific performance and enforcement" of the contract and an "order enjoining defendant from continuing to violate the terms of the Plan."[8]

In reaching its conclusion, the *Gauf* Court acknowledged the holding of *Owens* but wholly rejected it, stating that "our Circuit has consistently held that a complaint purporting to state a claim for equitable relief

---

[8] *Id.* at 770.

under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA Section 502(a)(3)."[9]

The Eleventh Circuit also rejected the *Owens* decision in *Blue Cross and Blue Shield of Alabama v. Sanders*.[10] As in *Owens*, *Gauf*, and the present case, the action in *Sanders* arose out of a plan provision permitting the plan to obtain reimbursement in the event the participant obtained a tort recovery against a third party. As in *Gauf*, the defendants relied upon *Owens*' assertion that a reimbursement claim is an action for legal relief unavailable under 29 U.S.C. § 1132(a)(3).

The Eleventh Circuit squarely rejected this argument, stating that:

> *Owens* appears to be based on an unduly narrow reading of *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). . . . The Court in *Mertens* did not imply that specific performance is unavailable under 29 U.S.C. § 1132(a)(3)(B). Because specific performance is a traditional form of equitable relief, . . . we believe that specific

---

[9] 188 F.3d at 771, *citing Harris Trust & Savings Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Neurobehavioral Associates, P.A.*, 53 F.3d 172, 173-74 (7th Cir. 1995).

[10] 138 F.3d 1347 (11th Cir. 1998).

performance may be equitable relief available under 29 U.S.C. § 1132(a)(3)(B).[11]

The Eighth Circuit, in *Southern Council of Industrial Workers v. Ford*,[12] upheld the right of a plan administrator to proceed under § 1132(a)(3) to enforce a subrogation provision and a written subrogation agreement. The plan administrator sought to compel a plan participant to reimburse the plan for medical expenses previously advanced out of proceeds gained from settlement of a personal injury claim. Holding that the allegation "that Ford admittedly failed to reimburse is a claim that Ford failed to comply with a term of the Plan," the Court found that the Plan's equitable action for unjust enrichment is permitted under ERISA Section 502(a)(3).[13] This holding, along with the decisions noted above from the Seventh and Eleventh Circuits, is directly at odds with the Ninth Circuit's *Owens* decision.

Other courts likewise have permitted actions for restitution or other equitable relief to proceed under ERISA Section 502(a)(3).[14]

---

[11] 138 F.3d at 1352-53, n. 5. *See also In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1268-69 (3d Cir. 1995).

[12] 83 F.3d 966 (8th Cir. 1996).

[13] *Id.* at 969.

[14] *See, e.g., Health Cost Controls v. Isbell*, 139 F.3d 1070 (6th Cir. 1997); *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998); *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938 (5th Cir. 1998); *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998); *Strom v. Goldman, Sachs & Co.*,

B. The *Cement Masons* decision conflicts with this Court's decision in *Mertens*.

The *Cement Masons* panel relied solely upon *FMC Corp. v. Owens,* which conflicts with this Court's decision in *Mertens*.

In *Mertens*, this Court ruled that the 29 U.S.C. § 1132(a)(3) does not allow a suit by plan participants for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. This Court held that ERISA Section 502(a)(3)'s limitation of remedies to "appropriate equitable relief" means that "money damages" are not recoverable. The Court reasoned that "equitable relief," as used in 29 U.S.C. § 1132(a)(3), means those types of relief that were "typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[15]

The Court, in reaching its decision, however, did not bar equitable remedies which would ultimately result in a monetary recovery. The Court did not, for example, state that specific performance,[16] a traditional form of equitable

---

202 F.3d 138 (2d Cir. 1999); *Walker v. Rose*, 22 F. Supp. 2d 343 (D.N.J. 1998).

[15] 508 U.S. at 256.

[16] Mandamus–one of the forms of appropriate equitable relief enumerated by the *Mertens* Court–is the equivalent of specific performance. Mandamus is defined as an "extraordinary writ which lies to compel performance of a ministerial act or mandatory duty where there is a clear legal right in plaintiff, a corresponding duty in defendant, and a want of any other appropriate and adequate remedy."

relief,[17] is unavailable under 29 U.S.C. § 1132(a)(3)(B) simply because such a remedy may involve the recovery of money.

In addition, the *Mertens* Court also ruled that "restitution" was among "those categories of relief that were typically available in equity. . . . " Other courts of appeals agree. For example, the Seventh Circuit in *Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co.*[18] held that an employer's claim for reimbursement of benefits pursuant to an employee benefit plan provision constituted an action for restitution, an equitable remedy available under

---

Black's Law Dictionary 663 (6th ed. 1991).

[17] *See Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979) ("An action for specific performance without a claim for damages is purely equitable and historically has always been tried to the court."). Other courts and legal scholars have reached the same conclusion: *In re Unisys Corp. Retiree Med. Ben. ERISA Litigation*, 57 F.3d at 1268-69 (specific performance is an equitable remedy); *Fischer Imaging Corp. v. General Electric Co.*, 187 F.3d 1165, 1172 (10th Cir. 1999) (specific performance is an equitable remedy); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 660-61 (6th Cir. 1996) (holding that specific performance is an equitable remedy and "[i]t is well-settled that equitable relief includes monetary damages where required to afford complete relief"); Pomeroy, *A TREATISE ON EQUITY JURISPRUDENCE*, § 1401 (5th ed. 1941); Lawrence, *A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE*, §§ 255, 256 (1929).

[18] 57 F.3d 608, 615-16 (7th Cir. 1995).

§1132(a)(3). The Fourth Circuit, in *LeBlanc v. Cahill*,[19] held that restitution, seeking "to restore the fund to the position it held before," is a category of relief traditionally available in equity, and thus, "falls squarely within the Court's definition of 'appropriate equitable relief' as stated in ERISA Section 502(a)(3)."[20]

Monetary recoveries are commonplace in restitutionary actions and will not transform the nature of the

---

[19] 153 F.3d 134, 153 (4th Cir. 1998).

[20] The Ninth Circuit, while recognizing "other appropriate equitable relief" available under § 1132(a)(3) includes restitution, held that "restitution," as used in § 1132(a)(3), means "ill-gotten gains." In other words, a claim for restitution would not lie unless the claimant was seeking to recover gains obtained through fraud or wrongdoing. 197 F.3d at 1005-7, *citing Owens*, 122 F.3d at 1261. The panel concluded that such circumstances did not exist in the present case because the "payment of Ms. Stone's medical bills by appellants was not obtained through fraud or wrongdoing" since "Cement Masons was required under the terms of the Plan to make those payments." *Id.* at 1007. The Ninth Circuit, in reaching this conclusion however, looked only at one side of the coin. While the plan participant's initial receipt of monies paid from the plan for medical expenses does not involve fraud or wrongdoing, the participant's subsequent failure to abide by *his* reciprocal obligation under the plan to reimburse the plan for benefits paid clearly results in "ill-gotten" gain–as defined by the Ninth Circuit–for the participant in the form of double recovery.

remedy sought from an equitable into a legal one as the Ninth Circuit in *Owens* implied.[21]

In addressing this issue of "appropriate equitable relief" under ERISA Section 502(a)(3), this Court in *Mertens* explicitly analogizes the phrase "other appropriate equitable relief" to the similar language of Title VII of the Civil Rights Act of 1964 which includes the term "any other equitable relief the court deems appropriate . . . ."[22] Title VII authorizes equitable relief which includes the payment of money; for example, the Supreme Court has authorized awards of both back pay and front pay (both monetary

---

[21] *Schwartz v. Gregory*, 45 F.3d 1017 (6th Cir. 1995); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (holding that monetary recoveries are considered equitable when "they are restitutionary"); *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 n. 4, 5 and 7 (7th Cir. 1995) ("although [plan administrator] clearly cannot recover compensatory damages under [§ 1132(a)(3)], if it successfully makes out a claim for restitution . . . it may be entitled to monetary relief"); *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d at 1268-69 (equitable relief under Section 1132(a)(3) includes monetary awards typically available in equity, but not compensatory or consequential damages; granting retirees both specific performance of fiduciary's assurances of post-retirement benefits and restitutionary reimbursement of back benefits).

[22] 508 U.S. at 255.

remedies) under Title VII, remedies which constitute "equitable relief."[23]

The *Mertens* panel recognized that "[m]oney damages are, of course, the classic form of legal relief."[24] In *Bowen v. Massachusetts*,[25] a case requiring analysis of the statutory exception in 5 U.S.C.A. § 702 denying district court review jurisdiction in actions against federal agencies seeking "money damages," this Court set forth the basic distinctions between an action for damages and an equitable action for specific relief. In particular, this Court held:

> The term money damages . . . normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, Handbook on the Law of Remedies 135 (1973).[26]

Employee benefit plans, in attempting to recoup benefits paid on behalf of a plan participant in third-party

---

[23] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993) (front pay characterized as equitable).

[24] 508 U.S. at 255.

[25] 487 U.S. 879 (1988).

[26] *Id.* at 895, *quoting Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1411 (D.C. Cir. 1985).

tort recovery situations, are seeking nothing more than specific remedies. The type of relief typically sought by employee benefit plans in such situations includes specific performance, restitution and/or injunctive relief. In pursuing these remedies, plan fiduciaries seek solely to enforce plan provisions and recoup a specific amount of money that has already been paid out. Plan fiduciaries do not seek money damages in an effort to compensate the plan or substitute for payments made in the first instance. Instead, the employee benefit plans are seeking specific relief in these instances which would grant them the very thing to which they are entitled under their plan terms

The Ninth Circuit, relying upon *Owens*, denies employee benefit plans these specific equitable remedies, concluding that "when the substance of the relief is monetary, . . . such a remedy is not available under section 1132(a)(3)."[27] This holding clearly conflicts with this Court's holding in *Mertens* that mandamus, injunction, or specific performance, which clearly encompass monetary relief, are "appropriate equitable relief" within the meaning of 29 U.S.C. § 1132(a)(3).[28]

---

[27] 122 F.3d at 1262.

[28] The *Mertens* Court did not hold that "injunction, mandamus, and restitution" are the *only* forms of appropriate equitable relief. On the contrary, the *Mertens* Court reasoned that "equitable relief," as used in 29 U.S.C. § 1132(a)(3), means those types of relief that were "typically available in equity (*such as* injunction, mandamus, and restitution, but not compensatory damages)." 504 U.S. at 256 (emphasis added). The *Mertens* Court was providing examples of equitable relief, not an exhaustive list as the *Owens* panel ruled.

II. This Court should grant the petition to resolve the circuit split concerning an important question of federal law.

The Ninth Circuit's decision effectively denies employee benefit plans the right to enforce subrogation and reimbursement provisions in situations where the ultimate recovery would include money. In so doing, the Ninth Circuit has stripped employee benefit plans of a valid and effective cost containment mechanism.

Employee benefit plans do not, as the Ninth Circuit suggested in *FMC v. Owens*, have the option of pursuing in state court claims to recoup medical expenses. In *Descant v. The Administrators of the Tulane Educ. Fund*,[29] for example, an employee benefit plan paid benefits on behalf of a covered person and moved to intervene in the covered person's state court action in order to enforce the plan's recoupment rights. The Louisiana Court of Appeals affirmed the trial court's decision to dismiss the employee benefit plan's petition in intervention because federal courts have exclusive jurisdiction to determine the recoupment rights of ERISA-covered plans:

> The issue of Canal Barge's right of subrogation is a matter to be decided under the federal ERISA statute, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101, *et seq.* Under ERISA, Congress explicitly set forth provisions granting federal district courts exclusive jurisdiction in civil actions brought by fiduciaries intending to enforce the terms of a benefit plan. 29 U.S.C.

---

[29] 706 So. 2d 618 (La. Ct. App. 1998)

> § 1132(a)(3)(B)(ii). Accordingly, the federal district court has exclusive subject matter jurisdiction to determine whether Canal Barge is entitled to reimbursement pursuant to a subrogation agreement.[30]

Similarly, in *Jefferson Pilot Life Ins. Co. v. Krafka*,[31] a third-party administrator of an ERISA-covered employee benefit plan sought to recoup benefits paid on behalf of a covered person after the covered person recovered from a third party for the same injuries that had been paid by the plan. The California Court of Appeals reversed the judgment granted in favor of the plan and ordered that the complaint against the plan be dismissed because federal courts have exclusive jurisdiction over recoupment actions brought by ERISA plan fiduciaries:

> . . . [T]he federal courts have exclusive subject matter jurisdiction of civil lawsuits under ERISA, except for actions under Title 29 of the United States Code, § 1132(a)(1)(B) and (a)(7); the state courts have concurrent jurisdiction in matters arising under those sub-divisions. Section 1132(a)(1)(B) and (a)(7) authorize actions, respectively: "by a participant or beneficiary . . . to recover benefits due to him [or her] under the terms of his [or her] plan, to enforce his [or her] rights under the terms of the plan, or to clarify his [or her] rights to future benefits under the terms of the plan" and "by a state to enforce compliance with a qualified medical child support order . . . ."

---

30 *Id.* at 627.

31 50 Cal. App. 4th 190 (1996).

> Plaintiff is not a plan participant or beneficiary, nor is it a state. Therefore, plaintiff is not a proper party to bring an action in the state court under ERISA, § 1132(a)(1)(B) or (a)(7). In other words, any action plaintiff may be able to bring under ERISA is not a lawsuit as to which this court can exercise concurrent subject matter jurisdiction. In the absence of subject matter jurisdiction, plaintiff's complaint must be dismissed.[32]

Because of the Ninth Circuit's decision in this case and ERISA's bar against fiduciaries pursuing actions in state court to enforce plan terms, employee benefit plans have no recourse to recoup medical expenses in third-party liability situations except to exclude coverage for such expenses. This Court should grant the Petition and consider this case on the merits.

CONCLUSION

The split among the circuits as to whether an employee benefit plan fiduciary may recoup benefit payments in third-party liability situations under ERISA Section 503(a)(3) threatens an important aspect of cost containment for employee benefit plans. The Ninth Circuit incorrectly interpreted this Court's decision in *Mertens* as barring claims under Section 503(a)(3) whenever the remedy involves a monetary recovery.

This Court should grant Cement Masons Health and Welfare Trust Fund for Northern California's Petition and resolve the split among the circuits, providing guidance on

---

[32] *Id.* at 194-95.

how to properly contain cost through the use of subrogation and reimbursement provisions.

Respectfully submitted,

Thomas H. Lawrence
Counsel of Record for *Amicus Curiae* Health Insurance Association of America

Lewis Fisher Henderson
& Claxton, LLP
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
(901) 767-6160

Dated: April 24, 2000.